

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-122

March 10, 2003

MAINE PUBLIC UTILITIES COMMISSION
Investigation into Potential Violations of
State Laws and Commission Rules by
WebNet Communications, Inc.

PROCEDURAL ORDER NO. 9:
SCHEDULING ORDER

This Procedural Order establishes discovery and litigation schedules (including the hearing on the merits) for the remainder of this case. It is entered pursuant to M.R.Civ.P. 16(a) and to decisions made as a result of discussions of the at a telephone conference held on March 6, 2003. The Prosecutorial Staff and the Public Advocate participated in that conference. WebNet did not participate in that conference, despite notice of the conference itself and the consequences of failure to participate provided in Procedural Order No. 8.

I. DISCOVERY RULINGS

1. No party may file any further requests for discovery of any kind (data requests, interrogatories, requests for documents, requests for admissions, depositions, or any other kind of discovery permitted by M.R.Civ.P. 26–36).

2. WebNet's December 19, 2002 request for production of documents to staff. Staff shall provide responses to this request by **March 12, 2003**. Failure of the Prosecutorial Staff to respond may result in sanctions under M.R.Civ.P. 37.

3. Prosecutorial Staff's December 20, 2002 interrogatories to WebNet. WebNet shall respond to these interrogatories by **March 24, 2003**. Failure of WebNet to respond may result in sanctions under M.R.Civ.P. 37.

4. Prosecutorial Staff's December 20, 2002 request to WebNet for production of documents. WebNet filed objections to the Request. The Prosecutorial Staff stated it has indicated orally to WebNet that it would voluntarily restrict time and geographic scope, but that it expects that WebNet will continue to object. WebNet and Staff shall comply with the provisions of M.R.Civ.P. 26(g)(1), which states:

No written motions under Rule 26 through 37 shall be filed without the prior approval of [the Hearing Examiner]. The moving party shall first confer with the opposing party in a good faith effort to resolve by agreement the issues in dispute.

Failure of the Prosecutorial Staff to confer (or offer or agree to confer) in good faith will preclude Staff from filing a motion to compel. Failure of WebNet to confer (or offer or agree to confer) in good faith will preclude WebNet from filing a motion for protection against discovery (and will mean that any objections it has raised or will raise are overruled). The parties shall confer in good faith on or before **March 13, 2003**. A good faith offer to confer by one party and the failure to confer by the other shall satisfy the conferring requirement. Any request for approval to file a motion shall be made by **March 17** and shall describe whether a conference took place, and if not, the reasons why it did not. If the Examiner permits a motion to be filed, it shall be filed by **March 19** and will be addressed at a conference as soon thereafter as possible. If the Hearing Examiner does not permit a motion to be filed, WebNet shall file responses to the interrogatories on or before **March 21, 2003**. Failure of WebNet to file responses may result in sanctions under M.R.Civ.P. 37.

5. Staff's December 20, 2002 Notice of Depositions. Staff has stated that it still intends to depose the WebNet personnel named in the Notice. Staff also stated that it expects that WebNet will file motions to "quash." The Civil Rules do not appear to have separate provisions for motions concerning depositions. M.R.Civ.P. 26(g)(1) (discussed above in paragraph 4) by its terms applies to all motions under Rule 26 through 37. Depositions are governed by Rule 30. The parties shall confer in good faith on or before **March 13, 2003**. A good faith offer to confer by one party and the failure to confer by the other shall satisfy the conferring requirement. Any request for approval to file a motion shall be made by **March 17** and shall describe whether a conference took place, and if not, the reasons why it did not. If the Examiner permits a motion to be filed, it shall be filed by **March 19** and will be addressed at a conference as soon thereafter as possible. If the Hearing Examiner does not permit a motion to be filed, the depositions(s) shall take place on or before **March 26, 2003**. Failure of WebNet to produce deposition witnesses may result in sanctions under M.R.Civ.P. 37.

6. All discovery shall be furnished or completed by the dates described in paragraphs 2-5 above. Failure to provide discovery may result in sanctions under M.R.Civ.P. 37.

II. DISPOSITIVE MOTIONS

1. Motions for Summary Judgment. A motion by any party for summary judgment shall be filed on or before **April 2, 2003**. This relatively late date is established because motions for summary judgment normally are not considered until the completion of all discovery. Any motion for summary judgment and any opposition to summary judgment shall comply fully with all of the requirements of M.R.Civ.P. 56 and with the notice requirement of M.R.Civ.P. 7(b)(1)(B). Any opposition to a motion for summary judgment shall be filed by **April 9, 2003**

2. Other “dispositive” motions. All other dispositive motions shall be filed by **March 26, 2003**. Failure to comply with this deadline may result in the preclusion or denial of the motion.

III. LITIGATION-RELATED RULINGS

1. Amended Prosecutor’s Report . Prosecutorial Staff shall file its amended Report on **March 14, 2003**. At the March 6 conference Staff represented that the amended Report would only delete some portions of the original Report and therefore would not contain any surprises.

2. Participation in hearing. On or before **March 17, 2003** WebNet shall state in writing whether it will appear and participate in the hearing on the merits scheduled for April 17, 2003 (and, if necessary, April 30). If WebNet states that it will participate in the hearing, it shall also state whether it will (a) cross-examine Prosecutorial Staff witnesses (and Public Advocate witnesses, if any), (b) present its own witnesses, or (c) both.

If WebNet does not state that it will appear and participate by the deadline stated above, WebNet will not be permitted (a) to request that the Prosecutorial Staff file pre-filed testimony (as described in III.4 below) or (b) participate in the hearing by cross-examining other parties’ witnesses or presenting its own witnesses.

3. Witness lists. On or before **March 17, 2003**, any party that will participate in the hearing shall provide a list of the witnesses it intends to call at the hearing. A party that fails to provide a list of witnesses will not be permitted to present direct testimony unless it can establish that extraordinary circumstances prevented it from providing a witness list. A party that fails to include a witness on its list of witnesses will not be permitted to present testimony from that witness unless it can show good cause for omitting the witness from the list.

4. Request for pre-filed testimony by Prosecutorial Staff. If WebNet, pursuant to III.2 above, states that it will appear and participate in the hearing on the merits, it may (by the same date as the III.2 filing, **March 17**, but not later) request that the Prosecutorial Staff (and the Public Advocate, if it plans to present witnesses) provide pre-filed direct testimony.

Chapter 110, §§ 930-32 provide that testimony is normally pre-filed, unless the Examiner orders oral testimony. Because of the statement of WebNet’s counsel (in its e-mail of March 4, 2003) that counsel has “no authority to participate in the conference call or in any other procedural matters concerning this proceeding,” the Examiner finds that it is reasonable to place a burden on WebNet to file a request that other parties file pre-filed testimony. If WebNet makes such a request, the Examiner will rule on the request expeditiously. If, pursuant to III.2 above, WebNet fails to state that it will appear and participate in the hearing on the merits, any request for pre-filed testimony will be

denied. If the Examiner requires the Prosecutorial Staff (and/or the Public Advocate) to file pre-filed testimony, those parties shall do so by **April 4, 2003**.

5. Pre-filed testimony by WebNet. If, pursuant to III.2 and III.4 above, WebNet states that it will appear and participate in the hearing, and it requests (and the Examiner orders) the Prosecutorial Staff (and/or Public Advocate) to provide pre-filed testimony, WebNet will also be required to provide pre-filed testimony, if, under III.3, it states that it will present evidence and provides a witness list. If WebNet is required to file pre-filed testimony, it will do so by **April 18, 2003**.

6. Potential Sanctions. Failure to comply with any of the requirements of this Part III may, in addition to the potential sanctions described above, result in dismissal, preclusion of issues, exclusion of witnesses and evidence and costs imposed on parties or counsel. See M.R.Civ.P. 16(d).¹

IV. HEARING

The hearing on the merits for this proceeding will take place on **April 17, 2003** at **9 AM** if no pre-filed testimony is required. If pre-filed testimony is required, the hearing will take place on **April 30, 2003** at **9 AM**.

A second day of hearings, if necessary, will be on **April 30, 2003** (if there is no pre-filed testimony) or on **May 8, 2003** (if pre-filed testimony is filed).

Dated at Augusta, Maine, this 10th day of March, 2003.

BY ORDER OF THE HEARING EXAMINER

Peter Ballou
Hearing Examiner

¹ **(d) Sanctions.** If a party fails to comply with the requirements of this rule or any order made hereunder, the court may impose upon the party or the party's attorney, or both, such sanctions as the circumstances warrant, which may include the dismissal of the action or any part thereof with or without prejudice, the default of a party, the exclusion of evidence at the trial, and the imposition of costs including attorney's fees and travel. The court may expressly order that the costs of sanctions be borne by counsel and not paid by counsel's client.